FILED
MAR 26 1957
JOHN T. FEY, Clerk

No. 860

In the

Supreme Court of The United States

October Term, 1956

WIESEN-HART, INC.,
Petitioner,

vs.

ADVISERS, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. WARREN KINNEY, JR.,
506 First Natl. Bank Bldg.,
Cincinnati, Ohio,
Attorney for Petitioner.

Court Index Press, Inc. — Law Printers — 809 Walnut St., Cincinnati 2, Ohio.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	9
Appendix A—Statutes Involved	10
Appendix B—Opinion of Court of Appeals	14
Appendix C—Motion to Strike Appeal	19

CITATIONS

Andrews v. Guenther Publ. Co. (D. Ct. S.D. N.Y.), 60 Fed. 2d 555, 557	8
Adventures in Good Eating, Inc. v. Best Places to Eat, Inc. (CCA 7), 131 Fed. 2d 809, 813	8
American Code Co. v. Bensinger, (CCA 2), 282 Fed. 829, 836	7
Baker v. Taylor, 2 Fed. Cases No. 782 (1848)	3, 6
Basevi v. Edward O'Toole Co., Inc. (D. Ct. S.D. N.Y.), 26 F. Supp. 41, 48	7
Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346	6
Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182	8
Heim v. Universal Pictures Co., Inc., (CCA 2), 154 Fed. 2d 480, 490	7
Markham v. A. E. Borden Co. (D. Ct. D. Mass.), 108 F. Supp. 695, 701	8
Mazer v. Stein, 347 U.S. 201, 214	6

Page

United States v. American Bell Telephone Co., 167 U.S. 224, 247 6
Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 ..... 2, 4, 5, 6, 7
West Publishing Co. v. Edward Thompson Co. (Cir. Ct. E.D. N.Y.), 169 Fed. 833, 879 7
West Publishing Co. v. Edward Thompson Co. (CCA 2), 176 Fed. 833, 835 8
Wheaton v. Peters, 33 U.S. 591 ..... 3, 7
Wrench v. Universal Pictures Co. (D. Ct. S.D. N.Y.), 104 F. Supp. 374, 378 7

STATUTES:

28 U.S.C., Section 1254(1) 2
Copyright Act, 1947, 61 Stat. 652, Title 17 U.S.C. Sections 11, 17, 24, 26, 209 ..... 2, 5, 6
Copyright Act of 1909, Section 12 5-6
Copyright Act of 1909, Section 55 6
Copyright Act of 1909, Section 26 6
Copyright Act of 1909, Section 24 6

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. ———

WIESEN-HART, INC.,

Petitioner,

vs.

ADVISERS, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Wiesen-Hart, Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on November 27, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals which is reprinted hereinafter as Appendix B, is reported in 238 F.(2d) 706. The District Court rendered a memorandum opinion (R. 55a) * which was not reported, nor was there a report of its judgment. (R. 56a-62a) *

---

* Denotes reference to Appellant's Appendix.

† Denotes reference to Appellee's Appendix.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 27, 1956. A petition for rehearing filed on December 17, 1956 was denied on January 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Whether the decision in *Washingtonian Publishing Co.* v. *Pearson,* 306 U.S. 30, abrogated the obligation of the copyright registrant of a book to comply fully with those provisions of the Copyright Act which relate to "the date of publication", as that term is defined in the Act, where a date of publication later than the actual date of publication results in an extension of the copyright monopoly beyond the statutory period.

(2) Whether the copyright registration of a book is valid and enforcible where "the date of publication" recited in the Certificate of Registration is several months later than the actual date of publication.

(3) Whether a copyright becomes void unless promptly registered.

(4) Whether the copyright statutes permit the owner of an original copyright registration to obtain a second, original, valid registration, two years after the first registration, on the identical work covered by the first registration.

STATUTES INVOLVED

The pertinent provisions of the Copyright Act, 1947, 61 Stat. 652, Title 17 U.S.C. Sections 11, 17, 24, 26, 209, are set forth in Appendix A.

STATEMENT

Respondent, Advisers, Incorporated, brought an action for infringement of its Copyright Registration Certificate No. A-120,772, against Petitioner, Wiesen-Hart, Inc.

The "date of publication" recited in Respondent's affidavit and registration certificate was December 9, 1953 (R. 47a, 47Aa).*

During the trial before the District Court on May 25-26, 1955, Tralins, author of the copyrighted book and President of Respondent, testified that he had personally distributed the copyrighted book "by the thousands" (R. 40a-41a)* in July and August 1953.

On June 15, 1955, Petitioner filed a motion for a summary judgment (R. 3b)† on the grounds that the proceedings in open Court on May 26, 1955, showed that the actual and true "date of publication" of the copyrighted work was several months earlier than the date set forth in the certificate of registration.

On December 23, 1955, the District Court, relying upon the decision of *Baker* v. *Taylor,* 2 Fed. Cases No. 782 (1848) and the decision of this Court in *Wheaton* v. *Peters,* 33 U.S. 591, granted Petitioner's motion for a summary judgment "on the ground that plaintiff's Certificate of Copyright Registration No. A-120,772, Class A, did not comply with the provisions of the Copyright Act and was therefore invalid—" and dismissed the complaint at Respondent's costs (R. 61a).*

After the judgment of the District Court had been entered (R. 61a-62a),* and after Respondent had filed its Notice of Appeal (R. 63a),* Respondent obtained Copyright Certificate No. A-217,432 on the same book containing exactly the same material covered by its earlier Copyright Certificate No. A-120,772; however, in the second

affidavit and registration certificate, Respondent recited that the "date of publication" was August 1, 1953 (R. 4b-5b).† Petitioner then filed a motion with the Court below which is reprinted hereinafter as Appendix C, to strike Respondent's Appeal No. 12,829 on the ground that all issues relating to the first registration became moot when Respondent applied for and obtained a second registration on the identical work covered by the first registration. A ruling on Petitioner's motion was deferred until after the appeal had been fully briefed and argued before the Court of Appeals.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed that the cases relied upon by the District Court "clearly sustained" its decision; however, the Court of Appeals was of the opinion that this Court's decision in *Washingtonian Publishing Co.* v. *Pearson,* 306 U.S. 30, abolished the "burdensome requirements" of the copyright laws prior to the Act of 1909. Following this theory the Court of Appeals held in effect that Respondent's failure to comply with the statutory provisions of the Act of 1947 as they relate to "the date of publication" did not invalidate the copyright even though the date of publication recited in the registration certificate was later than the actual date of publication and the copyright monopoly was extended beyond the statutory period.

And although the Court of Appeals agreed that the decision of the District Court was "clearly sustained" by the cases relied upon, nevertheless it denied Petitioner's motion to dismiss the appeal; set aside the order of the District Court granting Petitioner's motion for summary judgment and remanded the case to the District Court for a determination on the merits.

The United States Court of Appeals for the Sixth Circuit used language in its decision frankly expressing con-

cern as to the soundness of its reasoning in arriving at its decision, as follows: (Appendix B, p. 17)

> "It should be pointed out, however, that the opinion of the District Court is clearly sustained by what was said in the early cases therein relied upon, including the decision of the Supreme Court; and it may well be that that court may desire to review our determination in the instant case because of what was held in the earlier adjudication."

REASONS FOR GRANTING THE WRIT

This case presents important questions of Federal Law as to the scope of Sections 11, 17, 24, 26 and 209 of the Copyright Act of 1947, and as to the effect of the decision of this Court in *Washingtonian Publishing Co.* v. *Pearson,* 306 U.S. 30, on the interpretation of those sections of the Act. It further presents the question of whether the rules and regulations of the Register of Copyrights controls the granting of a second registration certificate to the owner of an earlier registration certificate for the same work, or whether the federal statutes control. On these important questions the present decision by the Court of Appeals for the Sixth Circuit is in direct conflict with the decisions of this Court.

(1) The decision of the Court of Appeals for the Sixth Circuit is in direct conflict with the decision of this Court in *Washingtonian Publishing Co.* v. *Pearson,* 306 U.S. 30. The Appellate Court failed to consider or appreciate certain important differences of fact between this case and the *Washingtonian* case. In the *Washingtonian* case the sole issue revolved around the intended meaning of the word "promptly" as used in Section 12 of the Copyright Act of 1909, since it was not defined in the Act, (nor in the Committee Report). This Court concluded that Sec-

tion 12 of the 1909 Act contained "doubtful language"; that "forfeitures are never to be inferred from doubtful language", and that "a certificate of registration provided for by Section 55 apparently may be obtained at any time".

However, in our case Section 26 is defined in the Act itself, and is clear, unambiguous and not subject to other interpretation. "The date of publication" can, under the statute, mean only one thing.

The statute creates the copyright, *Mazer* v. *Stein,* 347 U.S. 201, 214; and the copyright laws ought to be reasonably construed with a view to effecting the purposes intended by Congress, *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346. Here we are concerned with questions not of natural but of purely statutory right, which no Court can disregard, *United States* v. *American Bell Telephone Co.,* 167 U.S. 224, 247.

The Court of Appeals relied upon the *Washingtonian* case to justify an extension of the copyright monopoly beyond the statutory period, prescribed in Section 24 of the Act, on the reasoning that: "it would seem that, in view of copyright protection for 56 years, a period of four or five months would be an immaterial variance without consequence to the public unless there were some intention to secure an advantage in violation of the statute or with a fraudulent purpose."

Thus it can be seen that the Appellate Court has utilized the *Washingtonian* decision to circumvent the express statutory provisions of Sections 11, 17, 24 and 26 of the Copyright Act.

(2) The decision of the Court below in the instant case is directly in conflict with the decision in *Baker* v. *Taylor,* 2 Fed. Cases 782 (1848), which held that the date of publication in a copyright registration which is in fact

later than the true and earlier date of publication invalidates the registration. Other cases to the same effect are:

American Code Co. v. *Bensinger* (CCA 2), 282 Fed. 829, 836;
Heim v. *Universal Pictures Co., Inc.* (CCA 2), 154 Fed. 2d 480, 490;
Basevi v. *Edward O'Toole Co., Inc.* (D. Ct. S.D. N.Y.), 26 F. Supp. 41, 48;
Wrench v. *Universal Pictures Co.* (D. Ct. S.D. N.Y.), 104 F. Supp. 374, 378, and
West Publishing Co. v. *Edward Thompson Co.* (Cir. Ct. E.D. N.Y.) 169 Fed. 833, 879.

The decision of the Court below is likewise directly in conflict with the decision of this Court in *Wheaton* v. *Peters,* 33 U.S. 591, holding that all the conditions set forth in the copyright statutes are important and that "the law requires them to be performed; and, consequently, their performance is essential to perfect title".

The decision of the Court below admittedly waives compliance with the express terms of the statute and approves an extension in the term of the monopoly beyond the term defined by the statute.

(3) The language of the Court of Appeals that "unless a copyright is promptly registered, it becomes void", is directly in conflict with the decision of this Court in the *Washingtonian* case, wherein this Court held, 306 U.S. 30, at 40-41:

> "A certificate of registration * * * apparently may be obtained at any time and becomes evidence of the facts stated therein".

(4) The decision of the Court of Appeals in denying Petitioner's motion to dismiss the appeal, as moot, presents an important question in the administration of the Copyright Act. There is no statutory provision for the issuance

of a second copyright registration on the identical work covered by an earlier, subsisting registration on the same work. However, the Appellate Court, noting regulations of the copyright office "subsequent to the judgment in this case" (and seven months subsequent to Respondent's second registration), concluded that the issuance of a second registration certificate was "not * * * contrary to the statute".

This decision of the Court of Appeals of the Sixth Circuit is in direct conflict with the decision of this Court in *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U.S. 182, wherein the Court held at page 189:

> "There is absolutely no provision in the statutes for a second filing * * * nor is there any provision as to filing of any amendments thereto, and as the matter is wholly the subject of statutory regulation, we are at a loss to perceive by what authority any second application for the same painting, with a view to securing copyright thereon, can be sustained."

Other decisions holding that there can be but one copyright for the same book for the first term of twenty-eight years are:

West Publishing Co. v. *Edward Thompson Co.* (CCA 2), 176 Fed. 833, 835;
Adventures in Good Eating, Inc. v. *Best Places to Eat, Inc.* (CCA 7), 131 Fed. 2d 809, 813;
Markham v. *A. E. Borden Co.* (D. Ct. D. Mass.), 108 F. Supp. 695, 701;
Andrews v. *Guenther Publ. Co.* (D. Ct. S.D. N.Y.), 60 Fed. 2d 555, 557.

The statute contains no provision authorizing the issuance of a second copyright for the same book during the first twenty-eight year term; and the statute, rather than

the rules and regulations formulated by the Register of Copyrights, should control.

CONCLUSION

For any one or more of the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully,

J. WARREN KINNEY, JR.,
506 First Natl. Bank Bldg.,
Cincinnati, Ohio,
Attorney for Petitioner.

APPENDIX A

STATUTES INVOLVED

§ 11. Registration of claim and issuance of certificate

Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title. July 30, 1947, c. 391, § 1, 61 Stat. 652.

§ 17. Affidavit to accompany copies

In the case of the book the copies so deposited shall be accompanied by an affidavit under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photoengraving process, that such process was wholly performed within the limits of the United States and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photoengraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication. July 30, 1947, c. 391, § 1, 61 Stat. 652.

§ 24. Duration; renewal and extension

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the

expiration of twenty-eight years from first publication. July 30, 1947, c. 391, § 1, 61 Stat. 652.

§ 26. Terms defined

In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire. July 30, 1947, c. 391, § 1, 61 Stat. 652.

§ 209. Certificate of registration; effect as evidence; receipt for copies deposited

In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the

publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration. July 30, 1947, c. 391, § 1, 61 Stat. 652.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 12829

ADVISERS, INCORPORATED,
Appellant,

vs.

WIESEN-HART, INC.,
Appellee.

APPEAL from the District Court of the United States for the Southern District of Ohio, Western Division.

Decided November 27, 1956.

Before SIMONS, Chief Judge, ALLEN and MCALLISTER, Circuit Judges.

PER CURIAM. In an action for copyright infringement, the district court held, on a motion for summary judgment, that a variance between the actual date of publication of a book, and the date of publication alleged in the certificate of copyright registration, required by law to be filed, rendered the copyright unenforceable, and that such certificate was, accordingly, incapable of supporting an action for copyright infringement.

It is provided, by Title 17 U.S.C.A., Section 10, that any person entitled thereto by such section, may secure a copyright for his work by publication, with the notice

of copyright required by the statute. It is not disputed that the book here in question was published, together with notice of copyright.

It is further provided by the statute that one may obtain registration of his claim to copyright by complying with certain statutory provisions, one of which provides that, in the case of a book, the copies deposited in the copyright office shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths, made by the person claiming copyright, setting forth the date of completion of the printing of the book, or the date of publication. Title 17 U.S.C.A., Sections 11 and 17.

There is no stated time within which to file the required affidavit and secure registration of the claim to copyright, subsequent to publication with notice; but the statute provides that "there shall be promptly deposited in the copyright office" two copies of the work. Title 17 U.S.C.A., Section 13. As to what is considered to be prompt registration after publication with notice, see *Washingtonian Publishing Co.* v. *Pearson,* 306 U.S. 30. Unless the copyright is promptly registered, it becomes void. Title 17 U.S.C.A., Section 14.

In this case, it appears that the actual date of publication was in August, 1953; but that the date of publication, as set forth in the registration certificate, was December 9, 1953.

The date of publication, as set forth in the certificate of registration of copyright and as supported by the required affidavit, was later than the actual date of publication. It appears that, in opposition to appellee's motion for summary judgment, appellant filed affidavits explaining that the date of publication was based upon the date when the books, which were used for promotion and

advertising purposes in the jewelry trade, were first distributed to the public by retail jewelers, instead of the date when shipments were made by appellant to jewelers, when, in law, publication is deemed to have been made.

Appellee contends that the recital of a date in the affidavit and registration certificate later than the actual copyright date invalidates the copyright for the reason that it attempts to extend the copyright protection for longer than the statutory period, citing Title 17 U.S. C.A., Sections 17, 24, 26, and 209, and upon the authority of *Baker* v. *Taylor*, 2 Fed. Cases, No. 782 (1848), and *Wheaton* v. *Peters*, 33 U.S. 591, both of these cases supporting appellee's claim. It is to be noted that the statutory protection of a copyright extends for a period of twenty-eight years, and thereafter can be renewed for a further period of twenty-eight years. It would seem that, in view of copyright protection for fifty-six years, a period of four or five months would be an immaterial variance without consequence to the public, unless there were some intention to secure an advantage in violation of the statute or with a fraudulent purpose.

The authorities above mentioned, upon which appellee relies, are cases based upon earlier copyright statutes, and go back to the years 1834 and 1848. These cases clearly sustain the decision of the district court. However, in *Washingtonian Publishing Co.* v. *Pearson*, 306 U.S. 30, 36, it was said:

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary works of lasting benefit to the world.' "

The statute grants valuable rights to persons who create such matter which is copyrightable; and the later cases, in the courts of appeals and in the district courts, emphasize, implicitly, perhaps, on the ground of the subsequent revision of the copyright laws, that useless technicalities are not to be allowed to cut down the benefits conferred. See *United States* v. *Backer,* 134 F. 2d 533 (C.A. 2). In upholding the validity and enforceability of a copyright, Judge Paul Jones, in the District Court for the Northern District of Ohio, in *Sebring Pottery Co.* v. *Steubenville Pottery Co.,* 9 F. Supp. 383, said:

> "The facts that * * * there was a mistake made as to the date of publication in the affidavit attached to the application, do not in my opinion, invalidate the copyright. No prejudice resulted to the defendants or the public, and the misstatement of date is not of a character to justify a finding of purposeful falsehood."

It should be pointed out, however, that the opinion of the district court is clearly sustained by what was said in the early cases therein relied upon, including the decision of the Supreme Court; and it may well be that that court may desire to review our determination in the instant case because of what was held in the earlier adjudication. It is our conclusion, nevertheless, that an innocent misstatement, or a clerical error, in the affidavit and certificate of registration, unaccompanied by fraud or intent to extend the statutory period of copyright protection, does not invalidate the copyright, nor is it thereby rendered incapable of supporting an infringement action. See *Ziegelheim* v. *Flohr,* 119 F. Supp. 324.

There remains one further issue to dispose of. In a motion made by appellee in this court to dismiss the appeal, it appears that appellant caused to be filed with

the Register of Copyrights an affidavit showing that, as a result of an investigation which appellant made, it ascertained that some act amounting to publication might have taken place as early as August, 1953, and that appellant, therefore, was setting forth, in an application filed in the copyright office, the publication date as August 1, 1953, in order to correct the prior registration; and, as a consequence, that appellant had secured from the Register of Copyrights a corrected certificate of registration. Under the regulations of the copyright office, issued, however, subsequent to the judgment in this case, it would appear that the Register of Copyrights considers that a certificate of registration may be corrected within the intendment of the statute, Regulation 201.5 (b) of the Regulations of the Copyright Office, issued August 8, 1956, 21 F. R. 6021; and we are not convinced that such view is contrary to the statute.

In consideration of the above, appellee's motion to dismiss the appeal is denied.

In accordance with the foregoing, the order of the district court granting the motion for summary judgment is set aside and the case remanded to the district court for a determination on the merits.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Appeal No. 12,829

ADVISERS, INCORPORATED,
Appellant,

vs.

WIESEN-HART, INC.,
Appellee.

MOTION TO STRIKE APPEAL

Now comes Appellee, Wiesen-Hart, Inc., by its attorney of record, and hereby moves to strike the above captioned appeal for the following reasons:

1. Plaintiff-Appellant, Advisers Incorporated, filed Civil Action No. 3476 on December 8, 1954, in the United States District Court for the Southern District of Ohio, Western Division, charging Defendant-Appellee with infringement of copyright registration No. A 120,772, Class A (same as p. 47a of Appellants Appendix), for a "CASH $100.00 BOOK" published December 9, 1953.

2. The "application" for that copyright registration contained an "affidavit" (same as p. 47a of Appellant's Appendix) executed on December 31, 1953, by Albert Tralins, President and alter-ego of Plaintiff-Appellant, in which he stated under oath that the "CASH $100.00 BOOK" was first published in the United States on December 9, 1953.

3. The said Albert Tralins testified at the trial on May 25-26, 1955, that the true and actual date of publication was many weeks earlier than December 9, 1953, whereupon Defendant-Appellee had the Official Court Reporter transcribe those portions of Tralin's testimony which later became pages 201-4 of Volume II of the transcript of proceedings of the trial before the District Court. (same as p. 43a, 44a and 45a of Appellants Appendix)

4. On June 15, 1955, Defendant-Appellee filed a motion for a summary judgment (same as Appellee's Appendix 3b) against Plaintiff-Appellant on the ground that registration No. A-120,772 was void, since the "date of publication" appearing in the registration was later than the actual date of publication, which is defined in Section 26 of Title 17 U.S.C. as:

> "In the interpretation and construction of this title *'the date of publication'* shall in the case of a work of which copies are reproduced for sale or distribution be held to be *the earliest date when copies* of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority * * *." (emphasis added)

5. On August 9, 1955, after the trial of this cause in the District Court, the said Albert Tralins executed an affidavit (same as pp. 50a, 51a, 52a, 53a, and 54a, of Appellant's Appendix), including six exhibits which were filed with the District Court in opposition to the motion for summary judgment. In this affidavit Tralins made the following statement under oath:

> "The first order for the printing of plaintiff's 1953 copyrighted book was not given until *September 25, 1953*. The first shipment of these books was not made until October 22, 1953 to Dale Jewelers, of Shreveport, La. The first invoice from National Superior

> Corp., the printer who printed plaintiff's 1953 copyrighted book, was dated November 6, 1953 (See photostats attached hereto)." (emphasis copied from affidavit)

6. On November 25, 1955, the District Court in a letter memorandum held that the irregularity in the publication date of registration No. A-120,772 would "not support a complaint of infringement based on such a certificate of copyright".

7. On December 23, 1955, the District Court held that Defendant-Appellee's motion for a summary judgment was well taken and dismissed the complaint.

8. On January 6, 1956, the said Albert Tralins applied for a SECOND copyright registration on the same "CASH $100.00 BOOK" covered by registration No. A-120,772; and in the affidavit of the SECOND application Tralins deliberately and knowingly misrepresented the date of publication as "August 1, 1953" (same as Appellee's Appendix 4b), even though in his affidavit to the Court (same as Appellant's Appendix 50a, 51a, 52a, 53a, 54a) he stated under oath that the ORDER FOR PRINTING the subject book "WAS NOT GIVEN UNTIL SEPTEMBER 23, 1953."

9. On January 12, 1956, Albert Tralins executed still another affidavit (same as Appellant's Appendix 64a, 65a), which was forwarded to the Register of Copyrights, and wherein Tralins stated under oath:

> "5. * * * I have caused a careful examination to be made of the records of the proprietor and of the printing firm, National Superior Corporation, 351 West 52 Street, New York, New York, which printed the first edition of the subject book. This investigation discloses that shipments of the subject book were made at least as early as October 22, 1953, and that some act possibly amounting to 'publication' may have

taken place as early as August 1953. Therefore, in order that the claim of copyright not exceed the statutory period under any circumstances, I have selected as the publication date August 1, 1953.

"6. As a result of the aforesaid investigation, I have instructed my counsel to cause a second application for registration of a claim to copyright in the subject book, making reference to the first Registration No. A-120772 to be lodged in the Copyright Office."

Tralins deliberately misrepresented the true facts to the Copyright Office and the public in swearing under oath that the "date of publication" of the "CASH $100.00 BOOK" was August 1, 1953, WHEN THE PRINTING ORDER FOR THOSE BOOKS WAS NOT GIVEN UNTIL SEPTEMBER 23 – FIFTY-FOUR DAYS LATER! (Appellant's Appendix 65a). There can be no justification for the willful misrepresentations repeatedly made by Tralins, under oath. It is clear that Tralins appears before this Court, as before the District Court, with unclean hands.

10. On January 13, 1956, Registration No. A-217,432 was issued to Plaintiff-Appellant on the subject book of its earlier registration No. A-120,772, giving August 1, 1953 as the date of publication.

11. There is no provision in the copyright law for two concurrent copyright registrations on the *same* work. Herbert A. Howell, formerly Assistant Register of Copyrights, in his book "The Copyright Law", 3rd Edition, at page 39, states as follows:

"The utmost care should be taken in filling out the original application, for the Copyright Act provides no machinery for the correction of any errors made by the applicant which are not cleared up prior to actual registration and issuance of the certificate. If the applicant afterwards discovers that he made a wrong statement *of a material character*, SUCH AS THE

DATE OF PUBLICATION, it will be necessary to file a new application and surrender the original certificate for cancellation." (emphasis added)

12. The law provides for but one certificate of registration. The first registration is obviously void on Tralins own personal testimony and his affidavits all referred to hereinabove. The second registration is also void (even though not before the Court) since Tralins did not comply with the statutes.

When plaintiff obtained the second registration (A-217,-432) on the SAME WORK on the ground of an admitted *material* error in the first registration (A-120,772) all issues under the first registration became void, and thus moot.

It is respectfully submitted that the facts herein made of record present overwhelming grounds for granting the subject motion at Appellant's costs.

Respectfully,

J. WARREN KINNEY, JR.
506 First National Bank Bldg.
Cincinnati 2, Ohio
Attorney for Appellee